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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and FELIX ANTONIO ALDERISIO, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari

MEMORANDUM IN OPPOSITION TO MOTION TO MODIFY THE ORDER OF THE COURT

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MEMORANDUM IN OPPOSITION TO MOTION TO MODIFY THE ORDER OF THE COURT

The Solicitor General has asked this Court to modify the *per curiam* order of January 29, 1968, remanding the cause for an "adversary proceeding in the District Court," slip op., p. 2. The Solicitor General has asked that the Court permit the government to submit to the district court, *in camera,* all the logs of illegally monitored conversations. Then, after reviewing the material, the district court would, under the Solicitor General's proposed procedure, turn over to petitioners only those logs which it found to have some relation to petitioners' prosecution. Petitioners oppose the

Solicitor General's proposal, believing that it rests upon no tenable legal or factual foundation and that it would, in fact, deprive them of substantial Fourth, Fifth and Sixth Amendment rights. Petitioners have heretofore filed a Petition for Rehearing and a Reply Memorandum setting forth arguments and authorities on the question tendered by the Solicitor General's motion. This memorandum will not tax the Court's patience by reiteration of those arguments, but will cite them at appropriate points.

I. THE SOLICITOR GENERAL'S ARGUMENTS

The Solicitor General advances two contentions in support of his motion: First, he argues that much of the material overheard is irrelevant and scandalous—"the most arrant gossip"—and therefore disclosure of it will harm the interests of third persons whose names are mentioned or who may be participants in the monitored conversations. Second, he argues by implication the rationale advanced explicitly in *Ivanov* v. *United States,* No. 885, that disclosure will reveal the inner workings of investigative processes entitled to be free of such scrutiny.

A. The "Arrant Gossip" Rationale

The belated governmental concern with privacy and personal security is as self-serving as it is misplaced. The problem which the government professes to see can easily be met by means of a protective order under Rule 16(e), Federal Rules of Criminal Procedure. See *Dennis* v. *United States,* 384 U.S. 855, 875 (1966). Indeed, counsel for petitioners have every intention of asking the district court to order all parties not to disclose the contents of the overheard conversations to

anyone without a prior order of the court. Such an order would ensure that a defendant's right to protect himself from the government's illegal conduct is not to be conditioned upon disclosure of all the private thoughts and communications which the illegal conduct has monitored. A protective order to this effect has been entered in *United States* v. *Levinson, et al.*, Criminal No. 1561, D. Nevada, September 27, 1967.

The Solicitor General has, however, stated in a footnote to his Motion that "Attempts by the government to provide safeguards in the form of protective orders have not been uniformly successful." Petitioner is not aware of an instance in which a defendant or his counsel has been shown to have violated a protective order. On the other hand, the Solicitor General may not be aware of the shocking breach of privacy committed with the apparent connivance of agents of the government with respect to certain FBI microphone surveillances in Las Vegas. The details of these malefactions are set forth in an affidavit which counsel for petitioners have filed with the Clerk of this Court under seal, for examination by the Court and its personnel. The contents of the affidavit are thus safeguarded to protect the rights of the persons named therein. The affidavit presents the strongest of circumstantial evidence that the contents of illegally overheard conversations have at times been disclosed under circumstances suggesting that some government agents are less than entirely concerned with the rights of those victimized by illegal electronic surveillance. The risk thus presented cannot be met by an *in camera* proceeding, for the government's agents already know the contents of the illegally obtained material. The protective order procedure provided by the Federal Rules of Criminal

Procedure, reinforced by vigorous use of the contempt power, is a fair, equitable and adequate means of protecting third parties, defendants and the government.

B. The "Inner Workings" Rationale

Disclosure of the technique and fruits of illegal surveillance will, no doubt, require some revelation of the "inner workings" of governmental investigative agencies. It is entirely proper that this should be so,* for there is no conceivable justification in the present case for seeking to protect the confidentiality of Department of Justice investigative files relating to illegal surveillance. In the past, the Department has claimed the power to keep those files generally free from judicial scrutiny under a policy promulgated by the Attorney General. In *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), the Court upheld such a regulation as a "housekeeping provision" validly requiring all requests for disclosure to be referred to the Attorney General. That holding does not of course grant an evidentiary privilege to the contents of Department of Justice files. Nor does any relevant statute or regulation provide authority for the course suggested by the Solicitor General. See Petition for Rehearing, *Kolod* v. *United States,* No. 133, October Term, 1967, p. 6 n. 3 [hereinafter cited as Pet. Reh.], and authorities there cited.

If the "inner workings" rationale be seen as a restatement of the federal decisional law of "executive privilege", it is inapposite when the government (1)

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* The discussion which follows does not reach the question presented by "national security" cases. See Reply Memorandum to Memorandum in Response to Motion to Amend the Petition for Certiorari, *Ivanov* v. *United States,* No. 885.

has conceded the illegality of its conduct, (2) is nonetheless attempting to put the petitioners in jail for substantial periods of time, (3) is pleading for secrecy with respect to the fruits of illegality and, (4) is making a disputed contention that the illegality did not taint the petitioners' conviction. *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950), cited with approval on this very point in *Dennis* v. *United States,* 384 U.S. 855, 873 n. 20 (1966); *cf. Zimmerman* v. *Poindexter,* 74 F. Supp. 933 (D. Hawaii 1947).

Indeed, the rationale of *United States* v. *Andolschek,* 142 F.2d 503, 506 (2d Cir. 1944), cited with approval in *Dennis,* 384 U.S. at 873 n. 20, and *Roviaro* v. *United States,* 353 U.S. 53 (1957), dictates that, unless the government is willing to open its files to the extent necessary to ensure, through adversary proceedings in open court, that its unlawful conduct did not produce leads or evidence which contributed to petitioners' convictions, these cases must be dismissed.

This view of the executive privilege in this context also disposes of the Solicitor General's reliance upon Jencks Act cases such as *Palermo* v. *United States,* 360 U.S. 343 (1959), and the provisions of Rule 16(e), Federal Rules of Criminal Procedure. Jencks Act disclosures involve statements of witnesses interviewed by government agents; the witnesses are not parties to the litigation in which the statements are produced, and the investigative techniques leading to the taking of the statements are as a general rule lawful. Thus, the claim of the government to the privacy of its investigative files is the strongest possible. So also with discovery of the government's evidence under Rule 16. Here, however, the materials in question were obtained from a criminal defendant by means concededly un-

lawful. See Pet. Reh. 5, and cases there cited. The analysis above, as well as that in II, *infra,* demonstrates that in such a case the government has forfeited its claim to keep its files free from scrutiny.

C. The Scope of the Turnover

The Solicitor General's Motion to Modify apparently contemplates the turnover to the district court of only "the logs of all monitored conversations in which the defendant was involved," and not, for example, memoranda prepared from the logs or as a result of overhearing the monitored conversations. We do not read the Court's order of January 29 thus narrowly: The discussion at p. 2 of the slip opinion of the scope of the hearing to be held contemplates an "adversary proceeding" broad enough in scope to ensure that petitioners' convictions were not obtained in whole or in part as a result of governmental illegality.

In order to perform this task, the district court must review more than merely the logs of the monitored conversations. One telling reason why this is so is provided by the excerpts from testimony in the *Black* case set forth at pp. 4-8 of Reply Memorandum to Memorandum of the United States in Opposition, *Kolod* v. *United States,* No. 133, October Term, 1967. See also *Black* v. *United States,* 384 U.S. 983 (1966), in which this Court inquired of the use made of the "information" unlawfully obtained, as well as the details of the illegal surveillance, thus focussing not upon the logs and summaries of recorded conversations, but upon the far more significant question of dissemination. For the test of illegality is not whether information unlawfully obtained is itself introduced into evidence at trial, but the broader question whether by "the ex-

ploitation of the illegality," *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963), the government was led to evidence which was used against a defendant. This question cannot, of course, be answered by the mechanical comparison of logs to trial transcript. We turn, therefore, to a consideration of the scope of the hearing which ought to be granted in the district court.

II. WHAT KIND OF HEARING?

The precise scope of a hearing on illegal electronic surveillance cannot be judged in advance, but the general outline and underlying premise of such a hearing are clear: it must be open, subject to the safeguards of adversary procedure, and must permit the petitioners to follow the primary illegality through the government's filing system to see where it went and what use was made of it at each place it rested and in each form that it took. Only through the examination of records and the cross-examination of government agents can this inquiry take place.

In assessing this claim to a "free and open encounter", constitutional principles under the Fourth, Fifth and Sixth Amendments provide important governing standards.

A. A Defendant Is Constitutionally Entitled to Production in Open Court of All Logs and Summaries of All Conversations in Which He Was a Participant

This Court has suggested that a criminal defendant may have a due process right to discover his statements to the government. See *Clewis* v. *Texas,* 386 U.S. 707, 712 n. 8 (1967). See also Advisory Committee Notes to F.R. Crim. P. 16, 39 F.R.D. at 175-76, and cases there cited.

The Fourth Amendment also requires turnover to a defendant of the fruits of governmental illegality. The conceptual leap required to hold that the spoken word is within the protection of the Fourth Amendment, *Wong Sun* v. *United States,* 371 U.S. 471, 485-86 (1963); *Silverman* v. *United States,* 365 U.S. 505 (1961), and the subsequent renunciation by this Court of the "property rights" rationale for Fourth Amendment freedoms in favor of a "privacy" rationale, *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Katz* v. *United States,* 36 U.S.L. Week 4080 (Dec. 19, 1967), make it necessary to redefine as well the "return of property" provisions of law which have been an historic means of vindicating the rights of those victimized by illegal searches. For it is clear that, in addition to suppressing unlawfully seized evidence to prevent its use at any subsequent trial or proceeding,* a trial judge must, under F.R. Crim. P. 41(e) and the case law it embodies, return to the movant the materials unlawfully taken. The application to unlawful seizures of intangible words of this rule of law does not pose insurmountable problems. Are the logs and summaries of monitored conversations really any different from letters or unpublished manuscripts, in which the author retains a right in the intangible literary property which may coexist with the rights of a possessor in the paper itself? The petitioners suggest not, and

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* A trial judge, after finding evidence to have been unlawfully taken, must order it suppressed even though it does not appear to have led to the prosecution of the movant. See, *e.g., United States* v. *Baker,* 262 F. Supp. 657, 667 (1966). Thus the issue upon a suppression hearing is, in general, broader than that of "relevance," once illegality and standing to suppress have been established.

therefore urge the Court to assimilate the seizure of intangible words, for purposes of a return of property, to the seizure of tangible chattels, just as the Court has done for purposes of suppression of evidence. Put bluntly, the government is not lawfully possessed of the contents of the logs and summaries of petitioners' conversations, having acquired them by criminal means. The government's title to the logs is no higher or better than any thief's title to the fruits of his illegal activity, and the defendant therefore has an absolute right to return of the materials.

B. The Open Hearing

By misconceiving the trial judge's function as being one of mechanical comparison of the logs of monitored conversations with the evidence taken at the trial, the Solicitor General has been led into error. The logs are the basis and beginning of the inquiry and not its end or object. Few prosecutors are so blind or venal as intentionally to introduce unlawfully monitored conversations into evidence. Indeed, the illegal surveillances revealed by the government thus far have as a rule been designed to gather intelligence from which to develop cases against the targets of surveillance rather than to produce evidence directly usable in a criminal trial. That being so, the nexus between the contents of the logs and summaries and the evidence introduced at trial may be attenuated, though not so clearly so as to be "purged of the primary taint," *Wong Sun, supra,* 371 U.S. at 488. The issue is not relevancy, but use and dissemination. The government should not, therefore, be able to foreclose a full adversary inquiry by the device of turning over the logs themselves for an *in camera* determination.

A striking analogy may be drawn from cases dealing with the right of a civil litigant to summary judgment, without permitting the opponent the opportunity to cross-examine the movant's witnesses and confute the documentary evidence upon which the movant relies. In *Garrett Biblical Institute* v. *American University,* 163 F. 2d 265 (D.C. Cir. 1947), the court reversed a grant of summary judgment for the appellee even though the appellant had not, in the court below, marshalled facts in opposition to the appellee's moving papers. The court reasoned:

> "Much, if not all, of appellant's defense depends on a cross-examination of appellee's witnesses and on examination of appellee's documentary evidence, and we feel that since the defense is asserted in apparent good faith appellant is entitled to a trial which provides this opportunity to them. On the record as it stands, we cannot say that 'it is quite clear what the truth is.' " 163 F. 2d at 267.

Garrett relied upon *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944), in which this Court reversed a grant of summary judgment which had been based upon the affidavits of eight experts available only to the moving party. The Court dismissed the affidavits, saying:

> "But it [the moving party] may not withdraw these witnesses from cross-examination, the best method yet devised for testing the trustworthiness of testimony." 321 U.S. at 628.

It is only cross-examination which permits a witness's credibility to be put in issue. *Ibid.* As this Court said in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962), in terms as applicable to the circumstances of the present case as to the antitrust issues there at stake:

> "We believe that summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . ."

All the more, of course, should summary procedures be suspect when invoked at the behest of a litigant with the burden of proving "by clear and convincing evidence," *United States* v. *Wade,* 388 U.S. 215, 240 (1967), that his illegal conduct did not taint the petitioners' prosecution.

The Solicitor General seeks more, of course, than the right to restrict the scope of the hearing below. He would have the crucial initial decisions made in the privacy of the district judge's chambers. The metes and bounds of conceded governmental illegality may, the Solicitor contends, be stricken off by an initial decision in secret made upon the basis of material selected by the government.

Such an inquiry violates the Sixth Amendment guarantee of public trial, which extends to pretrial proceedings as well as to the presentation of evidence before the jury. See *United States* v. *Sorrentino,* 175 F. 2d 721, 722 (3d Cir. 1949). In *DiBella* v. *United States,* 369 U.S. 121, 131 (1961), this Court said: "Orders granting or denying suppression . . . are truly interlocutory, *for the criminal trial is then fairly in train.*" (Emphasis added.) See also *Levine* v. *United States,* 362 U.S. 610 (1960); *In re Oliver,* 333 U.S. 286 (1948).

And, as petitioners contend that they should have the right in the Court below to examine the agents who conducted the illegal surveillance and other persons

who may have knowledge as to its use, a public proceeding will provide checks upon the veracity of those witnesses as well as tending to ensure that the turnover of materials to the court is based upon a conscientious scouring of government files. See Bentham, *Rationale of Judicial Evidence,* Bk. 2, ch. X, § 2 (1st ed. 1827); 6 Wigmore, *Evidence,* § 1834 *et seq.*

Nor, we think, should one be overly impressed with the protestations of utter good faith, and at times of outraged innocence, which permeate the Solicitor's pleadings. The Solicitor General cannot be aware of the character and extent of the governmental illegality he proposes to have the district court explore in so cavalier a fashion. Petitioners recall *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958). There the issue was: Had the government used the grand jury proceedings with no intention of securing an indictment but with the intention of gaining discovery for use in a civil antitrust case? This Court said that on the record no such finding could be made. The case went back to the district court, where the Attorney General admitted on written interrogatory that intent to seek an indictment had been abandoned near the end of the grand jury investigation. The district court granted the defendant access to the grand jury minutes from that point forward. *United States* v. *Procter & Gamble Co.,* 175 F. Supp. 198 (D.N.J. 1959). The court did not, however, accept the Attorney General's statement on faith, even though given under oath. It ordered the Department of Justice to produce all its records relating to the decision to seek an indictment and to its practice of using grand juries for discovery purposes. *United States* v. *Procter & Gamble Co.,* 25 F.R.D. 485, 488 n. 2 (D.N.J. 1960). Thereafter, depo-

sitions were allowed to be taken of the Attorney General, his executive assistant, the head of the Antitrust Division, his successor, the head of the Litigation Section of the Antitrust Division, and the attorney who conducted the grand jury proceedings. On the basis of this extensive discovery, the district court found that, contrary to the Attorney General's assertions, there had *never* been an intent to seek an indictment. Consequently, the court ordered all the grand jury minutes turned over to the defense. *United States* v. *Procter & Gamble Co.,* 187 F. Supp. 55 (D.N.J. 1960). The government chose not to appeal. *Procter & Gamble* illustrates graphically the dangers of abandoning the protections provided litigants by full and open hearings in favor of accepting, on faith, self-serving representations by government agents. In *Nardone* II, 308 U.S. at 342, this Court was willing to stand upon the presumption that law officers habitually obey the law. But that presumption, like any other, "is effective . . . only in the absence of evidence to the contrary." *United States* v. *Procter & Gamble Co.,* 174 F. Supp. 233, 237 (D.N.J. 1959). The wholesale, albeit belated and reluctant, disclosures of recent days—in this case and many another—have reduced the presumption to a shambles.

C. Concluding Observations

The Solicitor General asserts in his motion that his suggested procedure would mean that "the government would in no sense be the judge of its own cause." Motion to Modify the Order of the Court, p. 3. He is mistaken. By imposing procedural handicaps upon the petitioners in the Court below, by regulating the flow of materials to the district court, and by withhold-

ing from examination in open court the persons responsible for the illegality and for its possible cloaking in the preparation of the prosecution, the proposed *in camera* procedure is merely another means of permitting the government to escape an accounting for its malfeasance. This is not the first time that the government has sought to grant the form, but not the substance, of relief from the results of its wrongdoing. We referred in the moving papers under Rule 25(2) after denial of certiorari to *McGarry* v. *United States*, No. 6925, 1st Cir., December 29, 1967, rehearing denied, February 2, 1968, cited at Pet. Reh. 3a. There, the government waited until the jury was in the box to disclose illegal electronic surveillance, and the defendant was put to a hearing with no opportunity to prepare, before an impatient judge, and with a jury waiting in the anteroom anxious to embark upon the trial.

The scope of the government's surveillance activity is still not known, but the disclosures already made portend that a great effort by judges and litigants will be necessary to purge the government's files of all taint of illegality. It may be tempting to seek shortcuts to that end, and the government must especially wish that the embarrassing round of disclosures and hearings will soon be over. But the Solicitor General's suggestion would not obviate, but would rather compound, the illegality, by superimposing upon it a constitutionally defective hearing and, more important, by teaching those responsible for the unlawful conduct that they may safely retain the fruits of their crime. See generally *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

III. CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Motion to Modify the Order of the Court be denied.

Respectfully submitted,

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